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IN THE

Supreme Court of the United States

CAPITAL ONE BANK (USA), N.A.,
F/K/A CAPITAL ONE BANK, and CAPITAL ONE, N.A.,
AS SUCCESSOR TO CAPITAL ONE F.S.B.,

Petitioners,

—v.—

COMMISSIONER OF REVENUE OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF THE CLEARING HOUSE ASSOCIATION, THE NATIONAL FOREIGN TRADE COUNCIL, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

__**Books, Treatises, Journals, and Other Sources**__

Pursuant to Rule 37.2 of the Rules of this Court, The Clearing House Association L.L.C. ("The Clearing House"), the National Foreign Trade Council ("NFTC"), the Organization for International Investment ("OFII"), the Securities Industry and Financial Markets Association ("SIFMA"), and the United States Council for International Business ("USCIB") (collectively, "amici") respectfully submit this brief amicus curiae in support of the petition of Capital One Bank (USA), N.A., fka Capital One, N.A., as successor to Capital One F.S.B. ("Capital One"), with the consent of all parties.[1]

INTEREST OF THE AMICI CURIAE

All amici are organizations concerned with the continued vitality of the U.S. economy, employment and international trade, and with the competitiveness of U.S. businesses both at home and abroad.[2] The Clearing House is an association of ten leading commercial banks.[3] The Clearing House regularly appears as amicus curiae in cases raising important issues relating to banking, and its

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[1] Both parties have consented to the submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission.

[2] For a description of each amici, see Appendix A hereto.

[3] The members of the Clearing House Association are ABN AMRO Bank, N.V.; Bank of America, N.A.; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA; JPMorgan Chase Bank, N.A.; UBS AG; U.S. Bank, N.A.; and Wells Fargo Bank, N.A.

members — along with those of the other amici — have a common and vital interest in the proper and consistent application of the nexus standards for state taxation in this country.

In addition to sharing concerns raised in Capital One's petition related to the inappropriate and imposition of state income or excise taxes, amici are concerned that a state's imposition of income and excise taxes on a corporation with no physical presence in that state threatens to damage U.S. international economic relations. In particular, amici believe that the decision below is likely to embolden aggressive extraterritorial taxation by both states and foreign nations; such actions by states will damage commercial comity between the U.S. and other nations, and such actions by foreign nations will result in the U.S. collecting less tax revenues (after foreign tax credits) from U.S.-based activities of U.S. residents and corporations. Amici believe that the question presented in the petition for certiorari in this case requires resolution by this Court to avoid these serious consequences.

SUMMARY OF ARGUMENT

The decision below[4] represents a broad and unwarranted exercise of state taxing jurisdiction and

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[4] *Capital One Bank* v. *Comm'r of Revenue*, 899 N.E.2d 76 (Mass. 2009), Petitioner's Appendix ("Pet. App.") at 1a-22a.

should be reversed because it carries serious implications for U.S. taxing jurisdiction vis-à-vis foreign authorities. The decision upheld Massachusetts' imposition of income-based excise taxes on Capital One despite Capital One's total physical absence from the state of Massachusetts — not an office, not a branch, not even a mailbox.

The decision below employs an "economic nexus" standard that violates the Commerce Clause of the U.S. Constitution and nearly universally accepted international norms requiring a physical presence (in the form of a "permanent establishment") as a predicate for income-based taxation. Indeed, the decision below openly disregards this Court's Commerce Clause decisions on the premise that this Court will overrule its precedents. If states are allowed to tax the income of citizens and corporations of other states or nations based on this nebulous economic nexus standard, the delicate balance carefully established by numerous international tax treaties will be upset, causing serious disruption to the expectations of international businesses that engage in commerce with U.S. persons.[5]

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[5] *See Quill Corp.* v. *North Dakota*, 504 U.S. 298, 317 (1992) (noting substantial reliance interest existing in the physical presence rule).

Moreover, a serious violation of international norms of the sort undertaken by Massachusetts here undermines the position that the U.S. has long embraced in tax treaty negotiations with foreign nations. Permitting such an unwarranted exercise of extraterritorial jurisdiction by one state is likely to invite reciprocal tactics by foreign taxing authorities, seriously compromising the U.S. economy, investments and employment in the U.S. and the competitive leadership of U.S. businesses. Ultimately, under the foreign tax credit system that has long been a cornerstone of our income tax system,[6] this would have the effect of surrendering to other nations taxing jurisdiction over activities of U.S. corporations which have no physical presence abroad and thereby reducing U.S. tax revenues.

ARGUMENT

I. Economic Nexus (as Opposed to Physical Presence) as a Basis for Extraterritorial Taxation Conflicts with International Tax Policy

The court below permitted the imposition of income-based excise taxes on Capital One based on an economic nexus standard and openly acknowledged that Capital One need not have any

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[6] *See* 26 U.S.C. §§ 901-908 (2008); *see also* 26 U.S.C. § 164(a)(3).

physical presence in Massachusetts.[7] Not only does such an economic nexus standard fly in the face of this Court's Commerce Clause precedents, it is diametrically contrary to the international consensus that is reflected in an intricate network of tax treaties.

A. International Tax Policy is Found in the Extensive Network of Bilateral Tax Treaties Binding Nations Throughout the World

Income tax treaties are bilateral agreements composed of a set of mutual adjustments and concessions between the treasuries of the treaty countries.[8] Although the first income tax treaty was signed at the turn of the 20th century, income tax treaties only became widespread after World War I when the war-torn governments of Europe imposed high income tax rates to finance their war efforts and reconstruction.[9] The treaties were designed to eliminate double taxation by allocating the tax base between countries in an equitable manner and, in doing so, promoting international trade and

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[7] *See* 899 N.E.2d at 78 n.5, Pet. App. 3a (noting the lower court's statement that no physical presence in Massachusetts was required).

[8] *See* Joseph Isenbergh, International Taxation: U.S. Taxation of Foreign Persons and Foreign Income (4th ed. 2006), § 101:1.

[9] *See* Zvi D. Altman, Dispute Resolution Under Tax Treaties 196 (International Bureau of Fiscal Documentation) (2005).

investment.[10] Physical presence had been the time-tested standard for establishing tax nexus. Consequently, these treaties adopted this standard as their own. With the globalization and integration of the nations' economies, taxation has become an increasingly international endeavor, further underscoring the importance of tax treaties to international trade.[11]

Among the network of treaties that developed, a universal requirement for imposing income taxes on a nonresident is physical presence in the taxing jurisdiction sufficient to constitute a "permanent establishment" (or "PE"), as that term is defined in those treaties.[12] Under these treaties, if there is a PE, the taxing jurisdiction may then tax the portion of the nonresident's income attributable to the PE, but only that portion.[13]

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[10] *See* Joel Slemrod, *Free Trade Taxation and Protectionist Taxation*, 2 Int'l Tax & Pub. Fin. 471, 479 (1995); *see also* Richard E. Andersen, *Analysis of United States Income Tax Treaties*, § 1.01, Warren, Gorham & Lamont of RIA (2009), *available at* ITTUS WGL 1.01.

[11] *See id.*

[12] *See* Isenbergh, *supra* note 8, at § 103:9; *see, e.g.*, Appendices B and C hereto (citing numerous tax treaties requiring a PE, including all tax treaties to which the U.S. is a party).

[13] Isenbergh, *supra* note 8, at § 103:9. A typical statement of this rule is as follows:

The United States currently is a party to 58 bilateral tax treaties covering 66 countries.[14] Each and every one of these treaties requires a PE before a foreign nation may impose tax on the business income of a U.S. resident[15] (and, reciprocally, prevents the U.S. from imposing a tax on the business income of a resident of the treaty counterparty absent a PE in the United States). All of the

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> The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as are attributable to that permanent establishment.

U.S. Model Treaty United States Model Income Tax Convention of November 15, 2006 (hereinafter "U.S. Model Treaty"), art. 5.

[14] *See* Testimony of Michael F. Mundaca, then-Deputy Assistant Secretary for International Tax Affairs, U.S. Department of the Treasury (current Acting Assistant Secretary (Tax Policy)), Before the Senate Committee on Foreign Relations on Pending Income Tax Treaties, at 5 (July 10, 2008), *available at* 2008 TNT 134-29 (2008). Because one of these 58 treaties covers multiple countries — in particular, the successor countries to the former U.S.S.R. — there are 66 countries involved.

[15] *See* Appendix B hereto.

tax treaties among the G8 nations,[16] India and China — economies that collectively represent over 60% of the worldwide GDP[17] — require a PE.[18] Worldwide, there are over 2,500 bilateral tax treaties in force.[19] "With different shadings in different treaties, some form of [the PE] principle is universal."[20]

This universal practice is also incorporated in model tax treaties that embody international norms. Like all the prior U.S. model treaties, the current U.S. Model Treaty, released in November 2006 and used by the U.S. as the basis for its treaty negotiations, includes the standard PE rule.[21] Additionally, the United Nations, as well as the

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[16] As a premier international forum for policy research and discussion, the G8 counts among its member nations Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. *See* G8 Summit 2009, *available at* http://www.g8italia2009.it/G8/Home/G8-G8_Layout_locale-1199882116809_FAQ.htm#ancora1.

[17] *See* The Central Intelligence Agency, World Fact Book, Country Comparisons — GDP (2008), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html

[18] *See* Appendix C hereto (citing all tax treaties among the G8 Nations, plus India and China, all of which contain a PE requirement).

[19] *See* Eduardo Baistrocchi, *The Transfer Pricing Problem: A Global Proposal for Simplification*, 59 Tax Law 941 (2006).

[20] Isenbergh, *supra* note 8, at § 103:1.

[21] U.S. Model Treaty, *supra* note 13, art. 5, art. 7, para. 1.

Organization for Economic Cooperation and Development (the "OECD")[22] — an organization that regularly serves as the premier international forum for reform efforts in a number of policy areas, including international taxation[23] — have similarly developed model treaties for purposes of assisting nations in negotiating tax treaties.[24] Both the U.N. and OECD model treaties contain the PE rule.[25]

Moreover, an OECD working group concluded (over objections voiced by a few countries, discussed

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[22] The OECD is a Paris-based organization composed of 30 industrialized countries — representing a significant majority of the world economy — "sharing a commitment to democratic government and market economy" through such efforts as coordination of "domestic and international policies to help members and non-members deal with an increasingly globalised world." OECD, What is the OECD?, *available at* http://www.oecd.org/document/11/0,3343,en_2649_34487_2482699_1_1_1_1,00.html.

[23] *See* Arthur J. Cockfield, *The Rise of OECD as Informal 'World Tax Organization' Through the Shaping of National Responses to E-Commerce Tax Challenges*, 8 Yale J.L. & Tech. 136 (2006).

[24] *See* United Nations Model Double Taxation Convention Between Developed and Developing Countries (2001) (hereinafter "U.N. Model Convention"); OECD Committee on Fiscal Affairs, Model Tax Convention on Income and on Capital (Paris, OECD 2008) (hereinafter "OECD Model Treaty").

[25] *See* U.N. Model Convention, *supra* note 24, art. 5; OECD Model Treaty, *supra* note 24, art. 5.

below) that the consistent inclusion of the PE requirement in the world's intricate web of tax treaties serves the important goals of economic predictability and uniformity in international trade, mitigating double taxation and preventing tax jurisdictional disputes while reducing considerable administrative burdens.[26] As a then-Treasury Department official testified in 2003 before a committee of the U.S. Senate. "[T]he success of this framework is evidenced by the fact that the millions of cross-border transactions that take place around the world each year give rise to relatively few disputes regarding the allocation of tax revenues between governments."[27] While this multilateral approach to tax nexus is well-established and

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[26] *See* Michael F. Mundaca, *How Much Should Borders Matter?: Tax Jurisdiction in the New Economy*, Testimony of Michael F. Mundaca, former Treasury Department official, then-Principal at Ernst & Young, current Acting Assistant Secretary (Tax Policy), U.S. Department of the Treasury, Before the Senate Committee on Finance, Subcommittee on International Trade, at 7 (July 25, 2006), *available at* www.senate.gov/~finance/hearings/testimony/2005test/072506mmtest.pdf (testifying about the OECD working group report).

[27] Testimony of Barbara Angus, International Tax Counsel, United States Department of the Treasury, Before the Senate Committee on Foreign Relations on Pending Income Tax Agreements, at 1 (March 5, 2003), *available at* 2003 TNT 45-19.

beneficial to all nations, the balance is delicate and not immune from disruption.

B. A PE Exists Only Where There is Physical Presence

All treaties including a PE requirement define a PE as a "fixed place of business," and most use the following more detailed definition:

> 1. [T]he term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
>
> 2. The term "permanent establishment" includes especially:
>
> a) a place of management;
> b) a branch;
> c) an office;
> d) a factory;
> e) a workshop; and
> f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.[28]

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[28] *See, e.g.*, U.S. Model Treaty, *supra* note 13, art. 5; OECD Model Treaty, *supra* note 24, art. 5; U.N. Model Convention, *supra* note 24, art. 5.

It is clear that a PE cannot exist without a physical presence in the jurisdiction, and that such presence must have some duration and permanence. The PE requirement protects U.S. corporations with customers — but no physical presence — abroad from overseas taxation. Reciprocally, the PE requirement (and various portions of the U.S. Internal Revenue Code) protect a non-U.S. company from U.S. taxation absent a physical presence in this country.

Despite slight variations in the definition of PE from treaty to treaty, one constant is the requirement of meaningful *physical* connection between the taxing jurisdiction and the taxpayer.[29] The Technical Explanation to the U.S. Model Treaty refers to the commentary in the OECD Model Treaty and explains that "a general principle . . . in determining whether a permanent establishment exists is that the place of business must be 'fixed' in the sense that a particular building or physical location is used by the enterprise for the conduct of its business . . . ."[30] The OECD Commentary uses similar language.[31]

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[29] Isenbergh, *supra* note 8, at § 103:11.

[30] Technical Explanation Accompanying the United States Model Income Tax Convention of Nov. 15, 2006, art. 5, ¶ 1.

[31] OECD Commentary to Article 5, ¶¶ 4-8. The OECD Commentary now also contains an alternative, less demanding,

Not only is physical presence the universally accepted standard for defining tax nexus, it is also the law of this nation under the Commerce Clause of the U.S. Constitution. As discussed in the petition for certiorari in this case,[32] this Court expressly endorsed the rule requiring physical presence in *National Bellas Hess, Inc.* v. *Dep't of Revenue of Illinois,*[33] and affirmed its continuing vitality twenty-five years later in *Quill Corp.* v. *North Dakota.*[34] Indeed, *Quill* itself summarized this Court's prior cases upholding state taxation as all "involv[ing] taxpayers who had a *physical presence* in the taxing State."[35] The concerns and interests that undergird the physical presence standard in this Court's Commerce Clause jurisprudence — the need to foster "settled expectations"[36] and to rescue taxpayers from the "welter of complicated obligations"[37] — are also

PE clause providing the potential for tax nexus over a service provider which is physically present in the taxing jurisdiction for at least 183 days out of any twelve month period. *Id.* ¶ 42.23. Even this crack in the wall of the PE provision merely loosens the *permanence* of the requisite physical presence, not the need for physical presence.

[32] *See* Pet. at 3-5.

[33] 386 U.S. 753 (1967).

[34] 504 U.S. 298 (1992).

[35] *Id.* (emphasis added).

[36] *Id.* at 314-16.

[37] *Bellas Hess*, 386 U.S. at 759-60.

the same concerns and interests that led to its adoption as the norm in the international community.[38]

C. The Lower Court's Departure from a Settled Norm of Physical Presence Will Encourage Aggressive Extraterritorial Tax Measures

The decision below imposed direct taxes on Capital One despite acknowledging Capital One's physical absence from that state. If the decision below stands, other U.S. states will be emboldened to extend their already-aggressive efforts to impose extraterritorial taxes.

Massachusetts is by no means the only state to impose taxes of the sort at issue in this case. Other examples abound, at least eight of which are discussed in the petition for certiorari in this case.[39]

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[38] *See, e.g.*, OECD Technical Advisory Group, Final Report, *Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-Commerce?*, (2006), *available at* http://www.oecd.org/dataoecd/58/53/35869032.pdf; Isenbergh, *supra* note 8, at § 103:2.

[39] *See* Pet. at 21-22, 31-33. *See also* N.Y. Tax Law § 1451(c)(1) (2008) (employing economic nexus to tax out-of-state banks which have issued credit cards to persons residing in New York); OHIO REV. CODE ANN. § 5751.02 (2008) (Ohio's Commercial Activity Tax); N.J. STAT. ANN. § 54:10A (2008) (New Jersey's Corporation Business Tax); *Kmart Props., Inc.* v. *Taxation and Revenue Dep't*, 131 P.3d 27 (N.M. App. 2001); *A&F Trademark Inc.* v. *Tolson*, 605 S.E.2d 187 (N.C. App.

While it is understandable that states must raise revenues and balance their budgets, extraterritorial taxation of those without a physical presence in the taxing state is the wrong approach to accomplishing these goals.

Additionally, New Jersey has recently targeted non-U.S. affiliates of domestic corporations operating in New Jersey.[40] New Jersey sends these non-U.S. affiliates a "nexus survey," and in response the non-U.S. affiliate reports that it has no physical presence in New Jersey. (It is well-established and undisputed that a corporate subsidiary, or other affiliate, does not constitute a PE of its owner or related corporations.[41]) New Jersey nevertheless responds with a tax assessment on the income that the non-U.S. corporation has received from its New Jersey affiliates.[42] Thus, New Jersey is now attempting to assert economic nexus taxation over

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2004), *cert. denied*, 126 S. Ct. 353 (2005); *Geoffrey Inc.* v. *Oklahoma Tax Comm'n*, 132 P.2d 632 (Okla. Civ. App. 2005).

[40] *See, e.g.*, Redacted Nexus Survey, July 17, 2006, *available at* http://www.ofii.org/njltr.pdf.

[41] *See, e.g.*, U.S. Model Treaty, *supra* note 13, at art. 5, para. 7; OECD Model Treaty, *supra* note 24, art. 5, para. 7.

[42] Kenneth T. Zemsky, *New Jersey Challenges U.S. Constitution's Foreign Commerce Clause*, 46 State Tax Notes 435 (Nov. 5, 2007) ("The non-U.S. affiliate's assurance that it has no physical presence . . . is met with a reply assessing a tax.").

non-U.S. corporations with no physical presence in New Jersey. New Jersey's recent actions demonstrate a dangerous expansion of the economic nexus principle internationally. New Jersey's pursuit of non-U.S. corporations with customers in New Jersey is also being conducted in a discriminatory manner because the state appears to be pursuing only those non-U.S. corporations whose in-state customers are affiliates.

Indeed, New Jersey's actions highlight the very reason that tax systems include a physical presence requirement. Tax enforcement and collection demand property present in the taxing jurisdiction. New Jersey is circumventing this practical requirement by pursuing only those non-U.S. corporations whose affiliates are physically present in New Jersey. Not only is the imposition of such a tax unwarranted, but it is also blatantly discriminatory against those non-U.S. companies which happen to be receiving income from affiliates in New Jersey, as opposed to those non-U.S companies receiving income from non-affiliates located in New Jersey.

Nor is such aggressive tax policy limited to the domestic arena. Spain and Portugal have formally registered exceptions to the portion of the OECD Model Treaty commentary discussing the fact that a

PE requires a physical presence.[43] Similarly, a report prepared by Indian tax authorities in 2001 argued for the abandonment of the traditional PE concept.[44] Most OECD members oppose these departures from the PE principle.[45]

Absent much-needed intervention by this Court, amici believe that Massachusetts — and other U.S. states — may begin taxing *non-U.S.* corporations that merely have *customers* in that state, much as New Jersey is already doing.[46] Indeed, nothing in the existing Massachusetts tax law here at issue — which is imposed on "every financial institution engaged in business in [Massachusetts]"[47] — precludes Massachusetts from doing exactly that.

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[43] *See* OECD Committee on Fiscal Affairs, Clarification on the Application of the Permanent Establishment Definition in E-commerce: Changes to the Commentary on the Model Tax Convention on Article 5, Paris, 22 December 2000.

[44] *See* Ministry of Finance (India), Report of the High Powered Committee on E-Commerce and Taxation 11-12 (2001).

[45] *See* OECD Committee on Fiscal Affairs, Response to the Comments Received on the April Discussion Draft on the 2008 Update to the Model Tax Convention, July 18, 2008, at 3 (discussing the alternative PE provision described *supra* note 31, and indicating that the OECD Committee on Fiscal Affairs "as a whole does not support the use of [even this modified PE provision] and many member countries have indicated that they would resist its inclusion in their bilateral treaties").

[46] *See supra* note 42 and accompanying text.

[47] MASS. GEN. LAWS ch. 63, § 2, Pet. App. at 66a-69a.

Even more alarmingly, foreign nations will seek to tax the income of U.S. residents and corporations, even though such residents and corporations have no physical presence overseas.

II. The Decision Below Has Serious Implications for U.S. Participation in International Trade

If those engaged in international commerce cease to be able to rely on physical presence in the United States as the baseline for direct taxation by U.S. states, the U.S. likely will suffer reductions in foreign corporations investing in U.S. subsidiaries and trading with U.S. residents and corporations. In addition, because the decision below will invite foreign nations to impose tax on the business income of U.S. residents and corporations that have not even a mailbox abroad, it will cause serious damage to the competitive leadership of U.S. businesses, not to mention a dangerous encroachment on the U.S. fisc.

A. The U.S. Will Suffer A Decline in Foreign Investment

The continuing ambiguity of tax jurisdiction standards in the United States, combined with the aggressive behavior of state tax administrators, will have a deterrent effect on foreign trade in the United States. If foreign companies are faced with large and unascertainable tax liability in the United States, they will choose instead to invest in trade

with countries where bright-line jurisdictional tests are understood and followed by legislators and tax administrators.

B. U.S. Companies Will Suffer Retaliation by Other Countries

U.S. companies operating abroad will likely suffer a destructive cycle of retaliation at the hands of foreign tax regimes. As discussed *supra* in Part I.C, a few countries have already sought to expand the extra-territorial reach of their tax laws through adoption of nexus standards similar to the economic nexus standard advocated by Massachusetts. U.S. businesses, which are leaders in e-commerce and international trade, naturally have the most to lose if extraterritorial taxation has a negative impact on e-commerce and international trade activities.

Moreover, U.S. businesses will suffer the result of losing more *in* the United States than comparable foreigners operating here. This is so because U.S. states that impose taxes like those at issue here are imposing them earlier and more consistently on domestic companies than on foreign companies, leaving the domestic companies at the competitive disadvantage of effectively paying higher taxes than similarly-situated foreign businesses with U.S. customers. Additionally, U.S. states do not allow tax

credits for foreign taxes paid,[48] thus exposing U.S. companies to the dual pincers of extraterritorial taxation by U.S. states *and* the resultant, retaliatory, extraterritorial taxation by foreign nations.

Even more seriously, retaliatory extraterritorial taxation by foreign governments will reduce tax revenues to the U.S. Treasury. Since 1918,[49] the Internal Revenue Code has included a foreign tax credit system under which U.S. taxpayers are granted a credit against their U.S. taxes for income taxes they have paid to foreign taxing authorities.[50] An aggressive expansion of taxing jurisdiction by other nations, coupled with credits for such taxes that offset U.S. taxpayers' *domestic* tax liability, will have the effect of significantly reducing U.S. tax revenues. The result will be a grave detriment to the national fisc.

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[48] *See* Walter Hellerstein, State Taxation, § 7.12[3] (3d ed. 2009) ("No state allows a foreign tax credit for corporate taxpayers . . . .").

[49] *See* Revenue Act of 1918, ch. 18, Pub. L. No. 65-254, § 222(a), 40 Stat. 1057. The Internal Revenue Code has allowed a deduction for foreign taxes paid since 1913. *See* Underwood Tariff Act, Pub. L. No. 63-16, ch. 16, § II(G)(b), 38 Stat. 114.

[50] *See* 26 U.S.C. §§ 901-908 (2008) (the creditability of foreign taxes is subject to certain limitations).

In closing, consider the complications posed by the mosaic of states' extraterritorial taxation regimes for a Swiss watchmaker. Though the business is physically present only in Switzerland, sales are made to U.S. residents through the internet, and the watches are shipped to the customers by common carrier. If the watchmaker faces the risk of taxation by *each* of the fifty states, it is likely to decide that trade with U.S. residents is not worth the trouble. The Commerce Clause prevents that result, and so should this Court.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 17, 2009

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A
DESCRIPTIONS OF AMICI CURIAE

- The Clearing House was founded over 150 years ago and is an association of leading commercial banks in the United States that provides payment, clearing and settlement services to its member banks and to other financial institutions. The Clearing House regularly appears as amicus curiae in cases that present issues of national importance to the commercial banking industry.
- The National Foreign Trade Council ("NFTC"), founded in 1914, is the oldest U.S. business association dedicated to international tax, trade, and human resource matters. The NFTC's approximately 300 members, representing the largest U.S. companies, are active advocates of free trade and a rules-based economy. The NFTC's emphasis is to encourage policies that will expand U.S. exports and enhance the competitiveness of U.S. companies by eliminating major tax inequities in the treatment of U.S. companies operating abroad.
- The Organization for International Investment ("OFII") is a business

association representing the U.S. subsidiaries of many of the world's largest international companies. U.S. subsidiaries of companies based abroad directly employ over 5 million Americans and support an annual U.S. payroll of $364 billion. OFII advocates fair, non-discriminatory treatment for U.S. subsidiaries to encourage foreign companies to conduct more business and create additional jobs in the United States.

- The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of more than 600 securities firms, banks and asset managers locally and globally through offices in New York, Washington, D.C., and London. Its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA's mission is to champion policies and practices that benefit investors and issuers, expand and perfect global capital markets, and foster the development of new products and services. Fundamental to achieving this mission is earning, inspiring and upholding the public's trust in the industry and the markets.

- The United States Council for International Business ("USCIB") represents over 300 U.S.-based multinational companies, professional firms, and business associations, seeking to advance the global interests of U.S. business at home and abroad. It promotes an open system of global commerce in which business can flourish and contribute to economic growth, human welfare and protection of the environment. USCIB is the U.S. affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee to the OECD (BIAC) and the International Organization of Employers (IOE).

APPENDIX B
ALL TAX TREATIES TO WHICH THE UNITED STATES IS A PARTY, ALL CONTAINING A PERMANENT ESTABLISHMENT CLAUSE

Convention Between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation, Article 5, Oct. 31, 1983; Convention Between the Republic of Austria and the United States of America for the Avoidance of Double Taxation, Article 5, Feb. 1, 1998; Convention Between the Government of the United States of America and the Government of the People's Republic of Bangladesh for the Avoidance of Double Taxation, Article 5, Aug. 7, 2006; Convention Between Barbados and the United States of America for the Avoidance of Double Taxation, Article 5, Feb. 28, 1986; Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation, Article 5, Dec. 28, 2007; Convention Between the United States of America and the Republic of Bulgaria for the Avoidance of Double Taxation, Article 5, Dec. 15, 2008; Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Article 5, Aug. 16, 1984; Agreement Between the Government of the United States of America and the

Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Oct. 22, 1986; Convention Between the Government of the United States of America and the Government of the Republic of Cyprus for the Avoidance of Double Taxation, Article 5, Dec. 31, 1985; Convention Between the United States of America and the Czech Republic for the Avoidance of Double Taxation, Article 5, Dec. 23, 1993; Convention Between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation, Article 5, Mar. 31, 2000; Convention Between the Government of the United States of America and the Government of the Arab Republic of Egypt for the Avoidance of Double Taxation, Article 5, Dec. 31, 1981; Convention Between the United States of America and the Republic of Estonia for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999; Convention Between the Government of the United States of America and the Government of the Republic of Finland for the Avoidance of Double Taxation, Article 5, Dec. 30, 1990; Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation, Article 5, Dec. 30, 1995; Convention Between the United States of America and the Federal Republic of Germany for

the Avoidance of Double Taxation, Article 5, Aug. 21, 1991; Convention Between the United States of America and the Kingdom of Greece for the Avoidance of Double Taxation, Article III, Dec. 30, 1953; Convention Between the Government of the United States of America and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation, Article 5, Sept. 18, 1979; Convention Between the Government of the United States of America and the Government of Iceland for the Avoidance of Double Taxation, Article 5, Dec. 15, 2008; Convention Between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Dec. 18, 1990; Convention Between the Government of the United States and the Government of the Republic of Indonesia for the Avoidance of Double Taxation, Article 5, Dec. 30, 1990; Convention Between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation, Article 5, Dec. 17, 1997; Convention Between the Government of the United States of America and the Government of Israel with Respect to Taxes on Income, Article 5, Dec. 30, 1994; Convention Between the Government of the United States of America and the Government of the Republic of Italy for the Avoidance of Double Taxation, Dec. 30, 1985;

Convention Between the Government of the United States of America and the Government of Jamaica for the Avoidance of Double Taxation, Article 5, Dec. 29, 1981; Convention Between the Government of the United States and the Government of Japan for the Avoidance of Double Taxation, Mar. 30, 2004; Convention Between the Government of the Republic of Kazakhstan and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 30, 1996; Convention Between the United States of America and the Republic of Korea for the Avoidance of Double Taxation, Article 9, Sept. 20, 1979; Convention Between the United States of America and the Republic of Latvia for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999; Convention Between the Government of the United States of America and the Government of the Republic of Lithuania for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999; Convention Between the Government of the Grand Duchy of Luxembourg and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 20, 2000; Agreement Between the United States of America and the Republic of Malta with Respect to Taxes on Income, Article 5, Jan. 1, 1997; Convention Between the Government of the United States of America and the Government of the United Mexican

States for the Avoidance of Double Taxation, Article 5, Dec. 28, 1993; Convention Between the Government of the United States of America and the Government of the Kingdom of Morocco for the Avoidance of Double Taxation, Article 4, Dec. 30, 1981; Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation, Article 5, Dec. 31, 1993; Convention Between the United States of America and New Zealand for the Avoidance of Double Taxation, Article 5, Nov. 2, 1983; Convention Between the United States of America and the Kingdom of Norway for the Avoidance of Double Taxation, Article 4, Nov. 29, 1972; Convention Between the Government of the United States of America and the Government of Pakistan for the Avoidance of Double Taxation, Article III, May 21, 1959; Convention Between the Government of the United States of America and the Government of the Republic of the Philippines with Respect to Taxes on Income, Article 5, Oct. 16, 1982; Convention Between the Government of the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation, Article 6, July 22, 1976; Convention Between the United States of America and the Portuguese Republic for the Avoidance of Double Taxation, Article 5, Dec. 18, 1995; Convention Between the

United States of America and the Socialist Republic of Romania for the Avoidance of Double Taxation of Income, Article 5, Feb. 26, 1976; Convention Between the United States of America and the Russian Federation for the Avoidance of Double Taxation, Article 5, Dec. 16, 1993; Convention Between the United States of America and the Slovak Republic for the Avoidance of Double Taxation, Article 5, Dec. 30, 1993; Convention Between the United States of America and the Republic of Slovenia for the Avoidance of Double Taxation, Article 5, June 22, 2001; Convention Between the Republic of South Africa and the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 28, 1997; Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation, Article 5, Nov. 21, 1990; Convention Between the Government of the United States and the Government of the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation, Article 5, July 12, 2004; Convention Between the Government of Sweden and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Oct. 26, 1995; Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation, Article 5, Dec. 19, 1997;

Convention Between the Government of the United States of America and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation, Article 5, Dec. 15, 1997; Convention Between the Government of the United States of America and the Government of Trinidad and Tobago for the Avoidance of Double Taxation, Article 9, Dec. 30, 1970; Convention Between the Government of the United States of America and the Government of the Tunisian Republic for the Avoidance of Double Taxation, Article 5, Dec. 26, 1990; Agreement Between the Government of the Republic of Turkey and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 19, 1997; Convention Between the United States of America and the Union of Soviet Socialist Republics for the Avoidance of Double Taxation of Income, Article 4 Jan. 29, 1976; Convention Between the Government of the United States of America and the Government of Ukraine for the Avoidance of Double Taxation, Article 5, June 5, 2000; Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation, Article 5, Mar. 31, 2003; Convention Between the Government of the United States of America and the Government of the Republic of

Venezuela for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999.

APPENDIX C
TAX TREATIES AMONG THE G8 NATIONS AND CHINA AND INDIA, ALL CONTAINING A PERMANENT ESTABLISHMENT CLAUSE

1990 EU Arbitration Convention, Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, Section II, Jan. 1, 1995; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Dec. 29, 1986; Convention Between Canada and France for the Avoidance of Double Taxation, Article V, July 29, 1976; Agreement Between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Mar. 28, 2002; Agreement Between the Government of Canada and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, May 6, 1997; Agreement Between the Government of Canada and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, May 5, 1997; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Italy for the Avoidance of Double Taxation, Article 5, Dec. 13,

1990; Agreement Between the Government of the People's Republic of China and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, Apr. 10, 1997; Agreement Between the Government of The French Republic and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Feb. 21, 1985; Convention Between the Government of the Republic of France and the Government of Japan for the Avoidance of Double Taxation, Article 5, Mar. 24, 1996; Convention Between the Government of the French Republic and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, Feb. 9, 1999; Elimination of Double Taxation and Establishment of Rules of Reciprocal Administrative Assistance in Fiscal Matters Between France and the SARR, Article 7, Dec. 31, 1956; Convention Between the Federal Republic of Germany and the People's Republic of China for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, January 1, 1985; Convention Between the Federal Republic of Germany and the French Republic for the Avoidance of Double Taxation, Article 54, Nov. 4, 1961; Agreement Between the Federal Republic of Germany and the Republic of India for the Avoidance of Double Taxation with Respect to Taxes

on Income and Capital, Article 5, Oct. 2, 1996; Convention Between the Federal Republic of Germany and the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, Dec. 24, 1992; Agreement Between the Federal Republic of Germany and the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, Dec. 30, 1996; Agreement Between the Government of the Republic of India and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Nov. 21, 1994; Convention Between the Government of the Republic of India and the Government of the French Republic for the Avoidance of Double Taxation, Article 5, Aug. 1, 1994; Agreement Between the Government of the Republic of India and the Government of the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Apr. 11, 1998; Convention Between Italy and Canada for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Dec. 24, 1980; Convention Between the Government of the Republic of Italy and the government of the Republic of France for the Avoidance of Double Taxation with Respect to the Taxes on Income and On Capital, Article 5, May 1, 1992; Convention Between the Government of the

Republic of Italy and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Nov. 23, 1995; Convention Between the Government of the Italian Republic and the Government of the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, Nov. 30, 1998; Convention Between the Government of Japan and the Government of Canada for the Avoidance of Double Taxation, Article 5, Nov. 14, 1987; Agreement Between the Government of Japan and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, June 26, 1984; Agreement Between Japan and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and to Certain Other Taxes, Article 5, June 9, 1967; Convention Between the Government of Japan and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Dec. 29, 1989; Convention Between Japan and the Republic of Italy for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, March 17, 1973; Convention Between the Government of Japan and the Government of the Union of Soviet Socialist Republics for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Nov. 27, 1986; Convention Between the Government of the United

Kingdom of Great Britain and Northern Ireland and the Government of Canada for the Avoidance of Double Taxation, Article 5, Dec. 17, 1980; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China for the Reciprocal Avoidance of Double Taxation, Article 5, Dec. 23, 1984; Convention Between the United Kingdom of Great Britain and Northern Ireland and France for the Avoidance of Double Taxation, Article 4, Oct. 27, 1969; Convention Between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for the Avoidance of Double Taxation, Article III, Jan. 30, 1967; Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Oct. 25, 1993; Convention Between the Government of the United Kingdom of Great Britain and the Northern Ireland and the Government of the Italian Republic for the Avoidance of Double Taxation, Article 5, Dec. 31, 1990; Convention Between the United Kingdom of Great Britain and Northern Ireland and Japan for the Avoidance of Double Taxation, Article 5, October 12, 2006; Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Russian

Federation for the Avoidance of Double Taxation, Article 5, Apr. 18, 1997; Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Article 5, Aug. 16, 1984; Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Nov. 21, 1986; Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation, Article 5, Dec. 30, 1995; Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation, Article 5, Aug. 21, 1991; Convention Between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Dec. 18, 1990; Convention Between the Government of the United States of America and the Government of the Republic of Italy for the Avoidance of Double Taxation, Article 5, Dec. 30, 1985; Convention Between the Government of the United States and the Government of Japan for the Avoidance of Double Taxation, Article 5, Mar. 30, 2004; Convention Between the United States of America and the Russian Federation for the Avoidance of Double Taxation, Article 5, Dec. 16, 1993;

Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation, Article 5, Mar. 31, 2003.